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THE UNITED STATES SUPREME COURT†

by

*Robert Ewing Thomason**

THE subject of this paper is that time-honored institution, the Supreme Court of the United States. This is open season on that great tribunal. The personnel of that Court is the target for a few Senators, Congressmen, lawyers, politicians, newspapers, and for quite a good many demagogues, radicals and extremists.

Many harsh words have been spoken. Resolutions have been filed in Congress and before some bar associations demanding investigations and even impeachment. Some prominent Senators, including one from Texas, have insisted that hereafter no man be appointed to the Supreme Court who has not had judicial experience. At the same time, however, Judge Abner McCall, Dean of Baylor Law School, who recently served an interim term on the Texas Supreme Court, received high and deserved praise from the bench and bar of Texas for his distinguished record, although he had no previous service as a judge.

One Senator holding a high and influential position on the Judiciary Committee of the Senate delivered and later had published a speech proclaiming that in at least one case, now the subject of much discussion, the Supreme Court had been indoctrinated and brainwashed by Communist groups bent on destroying our American way of life. A Senator-elect in Fort Worth recently branded all the members of the Court as "midgets." A candidate for President on an independent ticket in 1956 said in his campaign that the Supreme Court had discarded the law books for Communist novels. Not content with bitter attacks on most—and sometimes all—of the members of the Court, there have been many attacks and much criticism of the Court as an institution.

When the people lose confidence in the integrity of the Supreme Court—all courts, high and low—then may the Good Lord have

† Based upon a speech delivered before the Annual Conference of the Judicial Section of the State Bar of Texas, Lubbock, Texas, November 8-10, 1956.

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mercy on our country and the administration of justice in a free land!

The purpose of this paper is to put forth a few kind words for the Court. The author has not approved of all the decisions of the Court, nor does he especially admire some of its personnel. There are probably distinguished judges and lawyers throughout the country who share this feeling.

Whither are we drifting? If this tidal wave of hate and prejudice cannot be checked by reason, tolerance, good will and justice, what will happen to respect for all courts? Is the administration of justice by the courts, both Federal and State, to be supplanted by the rule of the mob?

This is not the first time in our history that the decisions of the Court have met with resistance. In 1803 Thomas Jefferson and his friends threatened impeachment against Chief Justice John Marshall for his opinion in *Marbury v. Madison*.¹ The House of Representatives passed articles of impeachment against Associate Justice Chase, but they failed in the Senate. Not many years after that decision, violent protests came from all over the country denouncing Marshall for his opinion in *McCullough v. Maryland*.² Bitter criticism followed Taney's decision in the *Dred Scott* case.³ In our own day some Congressmen wanted to impeach the "Nine Old Men" for striking down the National Recovery Act and other New Deal measures in the "Schechter Sick Chicken Case."⁴ But the Court has always survived the storms, just as it will do in the present turmoil.

Our Supreme Court is the highest and most honored court, with the most glorious judicial history in all recorded time. It was born with the Republic. When George Washington took the oath of office as first President in New York City in 1789, the new federal government had no judge and no courts. Speedy action was taken. Senate Bill Number One, which later became the Judiciary Act, still remains the basis of our Judicial System. Section 1 of Article III of the Constitution says, "The Judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish." It also provides that the judges shall hold their offices during good behavior, which, except in a few cases of impeachment of inferior court judges, has been for life. The framers of our judicial system had the idea that there should be one branch of the government that was independent

¹ 1 U.S. (1 Cranch) 368 (1803).

² 4 U.S. (4 Wheat.) 415 (1819).

³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 619 (1857).

⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

of the political changes in the executive and legislative branches. The founding fathers saw fit in their wisdom to divide the new government into three separate and distinct but co-ordinate branches. It was to be a government of checks and balances. Washington expressed the hope that the Supreme Court would be the "keystone of our political fabric."

And so, for more than one hundred and fifty years, it has survived the ravages of time, criticism, wars, bitter elections and changes in political administrations. It has been the refuge and protector of our liberties during all the changing years and the birth of new and complex problems. It has been our citadel of justice in a tragic and devastating civil war. It has frequently in the face of criticism, during two world wars, faithfully and honestly interpreted our time-honored Constitution as they understood it. In that high court law and order reign. The innocent find sanctuary and the weak refuge. In February 1940, ceremonies were held commemorating the one hundred fiftieth anniversary of the first meeting of the Court. One of the speakers, Congressman Ulysses S. Guyer, is remembered to have said that although the Supreme Court had been often criticized, its integrity had never been threatened. "We did not build the Supreme Court for today nor for tomorrow," he said. "We built it for the centuries. We commit it to the future. Its past is secure." The author joins Congressman Guyer in these sentiments.

Chief Justice Hughes, who presided at that occasion, added that "democracy is a most hopeful way of life, but its promise of liberty and human betterment will be but idle words save as the ideals of justice, not only between man and man, but between Government and citizen, are held supreme."

In October 1956, more than one hundred of the nation's most distinguished lawyers representing thirty-one states, met in New York City to decry the recent attacks on the Court. Mr. George Wharton Pepper, great lawyer and former Republican Senator from Pennsylvania, was chairman. A part of the text of the report which came out of that meeting is quoted:

As members of the bar we have been deeply disturbed by recent attacks on the Supreme Court of the United States. No institution of our Government, including the judiciary, stands beyond the reach of criticism; but these attacks have been so reckless in their abuse, so heedless of the value of judicial review and so dangerous in fomenting disrespect for our highest law that they deserve to be repudiated by the legal profession and by every thoughtful citizen.

The Constitution is our supreme law. In many of its most important

provisions it speaks in general terms, as is fitting in a document intended, as John Marshall declared, "to endure for ages to come." In cases of disagreement we have established the judiciary to interpret the Constitution for us. The Supreme Court is the embodiment of judicial power, and under its evolving interpretation of the great constitutional clauses—commerce among the states, due process of law, and equal protection of the laws, to name examples—we have achieved national unity, a nation-wide market for goods, and government under the guarantees of the Bill of Rights. To accuse the court of usurping authority when it reviews legislative acts, or of exercising "naked power" is to jeopardize the very institution of judicial review. To appeal for "resistance" to decisions of the Court "by any lawful means" is to utter a self-contradiction, whose ambiguity can only be calculated to promote disrespect for our fundamental law. The privilege of criticizing a decision of the Supreme Court carries with it a corresponding obligation—a duty to recognize the decision as the supreme law of the land as long as it remains in force.

There are ways of bringing about changes in constitutional law, but resistance is not such a way. Changes may be wrought by seeking an overruling decision, or by constitutional amendment. It is through the amending process, and not by resistance, that the people and the states stand as the ultimate authority.

The current wave of abuse was doubtless precipitated by the school segregation decisions, though it has by no means been limited to them. Since our position does not depend on agreement with those decisions, it is not our purpose to discuss their merits. As individuals we are entitled to our own views of their soundness. Some of us are definitely in disagreement with them. . . . Our present concern is for something more fundamental than any one decision or group of decisions; our concern is for the tradition of law-observance and respect for the judiciary, a tradition indispensable to the cherished independence of our judges and orderly progress under law.⁵

The report also quotes from one of the many memorable decisions of Chief Justice Marshall nearly a century and a half ago in *United States v. Peters*, when he said:

If the legislature of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.⁶

⁵ *Recent Attacks upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A.J. 1128 (1956).

⁶ 2 U.S. (5 Cranch) 206, 207 (1809).

Today there are a few who talk about an indefinite, uncertain and unconstitutional thing they call interposition, a doctrine which would lead to lawlessness and result only in controversy, discord and bitterness.

It is well for all citizens, and especially judges and lawyers, to occasionally re-read the 14th Amendment to our Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The little Brown girl made history, just as Dred Scott did, and her case against the Topeka Board of Education⁷ will probably be the subject of heated discussion for many years to come. It is not the purpose of this paper to discuss the correctness or righteousness of that decision. The unanimous decision of the Court reflects the viewpoint that they realized the Negroes were born in this country, pay taxes, fight and die in the defense of our free country, and under the amendment quoted above, they are entitled to their civil rights and equal protection of our laws.

Perhaps the decision came too soon and too fast, and perhaps we were not ready for it. The Court in a supplemental opinion said:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.⁸

On this basis the author believes—or at least hopes and prays—that this serious problem can be worked out within the due confines of law and order. Like it or not, a Supreme Court decision is the supreme law of the land as long as it remains in force. Any changes should be sought by an over-ruling decision or through an amendment to the Constitution.

In 1937 a serious effort was made by President Roosevelt to pass legislation vitally affecting the independence of the Court. The

⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁸ *Brown v. Board of Education of Topeka*, 349 U.S. 294, 299 (1955).

Congress very wisely sent that bill to the waste basket. Some of those who applauded that action then are now the loudest in urging legislation to curb the activities of the Court and also to ham-string the President in his free choice of appointees. Under our system it is to be expected that the President will usually appoint judges of his own political faith. In recent years this writer recalls two exceptions. President Truman appointed Senator Burton, a Republican Senator from Ohio, and President Eisenhower recently appointed Judge Brennan, a Democrat from New Jersey. The record shows that President Taft appointed quite a number of district judges in the South who were Democrats and he is charged with having said it was because he could find no qualified Republicans. Among others he appointed was the able Congressman from the eastern district of Texas—Gordon Russell of Tyler.

The point to which the author wishes to direct the reader's attention, however, is that regardless of the name, politics or lack of judicial experience; regardless, too, of whether he be Senator, police judge or college professor; the appointee must nevertheless be confirmed by that great august body—the United States Senate. It can stop any appointee if it has the will and courage to do so. It stopped John J. Parker of North Carolina, now Chief Judge of the Fourth Circuit, because it did not like one of his labor decisions. His opponents have probably lived to regret their action, for he is one of the great judges of the nation. The Senate very nearly failed to approve Chief Justice Hughes because it was felt he was a corporation lawyer. Chief Justice Hughes will go down in history as one of our greatest jurists and wisest statesmen. Desperate efforts were made to stop the brilliant Louis Brandeis, who will take his place in our judicial history along with the great Oliver Wendell Holmes. The Senate made bitter attacks on the confirmation of Mr. Justice Frankfurter because he was too liberal. Today he is regarded by many as the most conservative of the Court.

It is clear that the Senate has the right, power, authority and opportunity to prevent the confirmation of any appointee. If Senators do not like the present personnel of the Court they should accept their share of the responsibility for their presence on the Court.

Jerre Williams, Professor of Law at the University of Texas, has recently written and published an interesting and informative book entitled *The Supreme Court Speaks*. The following quotation is from the epilogue:

New cases will come before the Supreme Court, and new faces will

be seen on its Bench, but the tradition of continuity, which we lack in the other branches of the government, will undoubtedly still surround the Court. The political winds shift abruptly and often in the Congress and in the Administration. Not so in the Court Our Supreme Court is a symbol of orderly constitutional government. But the Court is also far more than just a symbol. Government by law purely for the sake of order is tyranny; government by law so that the lowest and the highest among us are equally protected and equally controlled is the road to freedom. Here is the curious paradox. The Supreme Court is the undemocratic organ of our government, in the sense that the justices are appointive and that they serve for life. If there was to be order for its own sake—tyranny—in our system, we would expect its manifestation first in the Court. Yet we have seen that the importance of the Court as a protector of human liberty is past measuring. Our Court is an integral part of the tradition of freedom.

Because of its power to pass upon the constitutionality of legislation, the Supreme Court of the United States is the most powerful judicial body in the world. This power compels awesome responsibility. . . . That the Supreme Court has acquitted itself in this trust with exceeding honor, there can be no shadow of doubt. The strength, prosperity, and eminence of the United States is absolute attestation. The nation, and indeed the world, listens when the Supreme Court speaks.⁹

In conclusion, this writer pleads for respect for and confidence in the United States Supreme Court, the highest court in our land. The same plea is made for all our courts. The Supreme Court is truly a court of last resort. Like it or not, under our living Constitution it is last word in judicial determination. All litigation must some time reach an end. There must be official and judicial finality lodged somewhere. We live under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property. The true administration of justice is the corner-stone of good government. Civil rights for all people will be achieved regardless of race, color or religion if the courts administer justice and exercise patience, tolerance and the Christian spirit. We are all God's children and He placed black, brown and yellow skins on two-thirds of the people of the world. Although the South will never tolerate inter-marriage between white and black people, and will never practice social equality, through courts of justice we will see to it that the under-privileged of all races enjoy the same civil and constitutional rights as the balance of us. We will never do that by resorting to armed force. We will never tolerate the mob. The Ku

⁹ WILLIAMS, *THE SUPREME COURT SPEAKS* 425, 426 (1956).

Klux Klan was run out of Texas, and it will not return. Good citizens will observe the law and assist the courts in administering justice.

The courts through their judges will live up to the motto that Chief Justice Taft had placed over the entrance to our magnificent Supreme Court Building: "Equal Justice Under Law."